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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 1070 94

BOARD OF COMMISSIONERS OF SAN JUAN,
Petitioner,

vs.

CARLOS M. DE CASTRO.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

F. Fernandez Cuyar,
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BOARD OF COMMISSIONERS OF SAN JUAN,
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vs.

CARLOS M. DE CASTRO.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIRST CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, the Board of Commissioners of San Juan, Puerto Rico, prays a writ of certiorari to review the judgment of the Circuit Court of Appeals, First Circuit, entered on January 10, 1941, in the cause entitled Board of Commissioners of San Juan *versus* Carlos M. de Castro (No. 3643), affirming judgment of the Supreme Court of Puerto Rico, which reversed judgment of the District Court of San Juan, Puerto Rico.

The term for filing petition for a writ of certiorari shall expire on May 20, 1941, since a petition for rehearing of the judgment entered by the Circuit Court of Appeals was denied on February 20, 1941. 28 U. S. C. A. 350.

Summary Statement.

The controversy herein began on December 10, 1938, when a petition was filed with the Board of Commissioners of San Juan, Puerto Rico, praying that the charges specified in said petition be preferred against the then City Manager of San Juan, Doctor Carlos M. de Castro, and praying, further, that the Board initiate impeachment proceedings against said city manager, in conformity with the provisions of Section 22 of Act No. 99 of May 15, 1931, "to establish a special government for the Capital of Puerto Rico and for other purposes" (R. 46-55).

The requisite hearing was held, and, finally, a resolution was approved by the Board finding several of the charges duly proved and decreeing the removal of the City Manager (R. 6-9). This resolution was unanimously approved by all the commissioners.

Six days later (R. 1-15), the ousted officer, ostensibly acting pursuant to Section 46 (See appendix) of the aforesaid Act, filed before the District Court of San Juan a petition to review the action of the Board and to annul the resolution which decreed his removal from office. The proceedings thus initiated avowedly were not brought under the provisions of the "Act to establish writs of certiorari", approved by the Insular Legislature on March 10, 1904 (See Code of Civil Procedure of Puerto Rico, 1933 Ed., page 272 *et seq.*). As already stated, the petition for review was filed expressly as allegedly authorized by Section 46 of the Act to establish a special government for the Capital of Puerto Rico.

After hearing, the District Court of San Juan dismissed the petition (R. 38-46). It held that the evidence presented to the Board to substantiate charges number VI and XXII was conflicting, and that under the repeated jurisprudence of the Insular Supreme Court, and in view of the respect

due to the constitutional separation of powers between the three branches of government, it could not validly substitute its opinion for that of the Board in the weighing of evidence and in its conclusions of fact (R. 44-45).

An appeal was then taken by the ousted city manager to the Supreme Court of Puerto Rico from the judgment of the local district court (R. 75-76). This appeal was prosecuted in the ordinary manner provided by the Code of Civil Procedure for appeals in civil cases (Code of Civil Procedure of Puerto Rico, 1933 Ed., Sections 292 and 295). The special statute under which the original petition for review was filed by respondent herein in the District Court of San Juan does not grant the right of appeal to the Insular Supreme Court from judgments rendered in proceedings instituted under Section 46 of said special statute.

Petitioner herein questioned the jurisdiction of the local District Court (R. 19-28) on the grounds that Section 46 of the special statute mentioned creates, as a new and special remedy, a writ of review directed to correct only "*legislative or administrative*" acts of the Board of Commissioners, and since the removal for cause and after hearing of a public officer is an act not legislative or administrative, but of a judicial or quasi-judicial nature, and since the special proceeding for review created by Section 46, *supra*, should not be enlarged or extended by judicial construction so as to embrace other cases not expressly included therein, the District Court obviously had no jurisdiction to act in the premises. Said court, however, postponed its decision on the matter (R. 36-37), and in the end never passed on the point.

The jurisdiction of the Insular Supreme Court was, therefore, also questioned by petitioner herein (R. 201-220). In addition to the reasons set forth to demonstrate the District Court's lack of jurisdiction, which, consequently, showed the want of jurisdiction of the appellate tribunal,

a further point was raised in the Insular Supreme Court to establish its want of authority over the appeal taken. Summarily stated, it is as follows:

Section 46 of the special act in controversy created an extraordinary proceeding by providing a new remedy for a new situation, namely, a writ of review to correct any legislative or administrative act of the Board of Commissioners which should be contrary to the Organic Act or to the laws of Puerto Rico. The remedy thus created is exclusive and is not included among those contemplated by the pertinent provisions of the Code of Civil Procedure (1933 Ed., Sections 292 and 295). Jurisdiction is granted solely and exclusively to the District Court of San Juan, and the statute does not authorize an appeal from the judgment to be rendered by said District Court. It is obvious, therefore, that in the absence of specific statutory authority, the right of appeal to the Insular Supreme Court is not available to any of the parties, and, hence, that said Supreme Court cannot entertain and decide an appeal taken, its judgment being consequently void.

These contentions were implicitly overruled by the Insular Supreme Court (R. 356), and, the case having been fully submitted to that court, judgment was entered on June 28, 1940, reversing that of the local District Court and ordering the reinstatement of respondent herein in the office of City Manager of San Juan, said reinstatement to date back from January 5, 1939, when he was suspended from office (R. 188).

The opinion of the Insular Supreme Court is clearly erroneous in various respects, but, for the purposes of this petition, it is sufficient to mention assignment of error marked number 5 (R. 223) in the appeal documents filed in the Circuit Court of Appeals. One of the charges preferred against the City Manager (number 22; R. 53) was to the effect that said City Manager failed deliberately to put

in effect and enforce ten or more ordinances specifically mentioned, which had been duly approved by the Board of Commissioners. The Board heard evidence on the matter and found the charge duly proved, concluding that respondent herein had, as a matter of fact, "voluntarily, purposely, systematically and negligently, without legal or moral excuse, knowingly, and ignoring the express mandate of the Board, failed to comply with the obligations and duties imposed upon him by ordinances number 360, 367 and 371 of the Board * * *" (R. 8).

Passing on this charge and on the evidence presented to sustain it, the local District Court held that there was a conflict in the evidence of both parties, and refused to substitute its opinion for that of the Board (R. 44).

The Insular Supreme Court took a different view of the matter. Plainly disregarding the constitutional division of powers between the three branches of government, it concluded that the City Manager's failure to put into effect the ordinances was nothing more "than perhaps an abuse of discretion or a difference in opinion as to the merits of the ordinances, and were not the just cause to which the statute relates" (R. 185). It was, thereby, judicially established that all municipal legislation is subject in Puerto Rico to the Municipal executive's opinion with regard to the merits or demerits of said legislation. The constitutional division of powers inherent in our government system (See Organic Law of Puerto Rico, 48 U. S. C. A. 737, 39 Stat. 951) was thus ignored.

An appeal having been granted to the Board of Commissioners from the judgment of the Insular Supreme Court (R. 230), the Circuit Court of Appeals for the First Circuit entered judgment on January 10, 1941, affirming that of the Supreme Court of Puerto Rico (R. 241) and denied rehearing thereof on February 20, 1941 (R. 264). The judgment of the Circuit Court of Appeals (R. 241-242) is

based only on the assertion that the Insular Supreme Court was not "inescapably wrong" in its conclusions, and that, although the Circuit Court does not necessarily approve all the language in the opinion of the Insular Supreme Court, it cannot be said that that Court was "patently erroneous" in its conclusion that the evidence did not establish the statutory just cause required for removal of the City Manager.

An elaborate petition for rehearing was filed by petitioner herein in the Circuit Court of Appeals (R. 242-261). It was denied on February 20, 1941 (R. 264).

Statement of Jurisdiction.

The jurisdiction of this Hon. Court is invoked under the provisions of Section 240 (a) of the Judicial Code of the United States, as amended by the Act of February 13, 1925, C. 299, Sec. 1, 43 Stat. 938 (28 U. S. C. A. 347).

The judgment of the Circuit Court of Appeals for the First Circuit was entered on January 10, 1941 (R. 241), and rehearing thereof was denied on February 20, 1941 (R. 264).

Questions Presented.

This petition involves three questions of law:

1. Whether or not the Circuit Court of Appeals erred in finding that the Supreme Court of Puerto Rico was not inescapably wrong in assuming jurisdiction over this controversy, absent any statutory or constitutional authorization so to do, and in spite of the fact that the special statute under which respondent herein acted fails to grant the right of appeal from the judgment of the local District Court to the Insular Supreme Court, as well as in view of the fact that the local District Court had not, in the first instance, jurisdiction over the subject matter, so that, on appeal, the appellate tribunal could not acquire jurisdiction over the subject matter.

2. Whether or not the judgment of the Supreme Court of Puerto Rico, reversing that of the local District Court, is not patently erroneous insofar as it fails to recognize our constitutional division of powers between the legislative and executive branches of government, since it declares that a municipal executive is not subject to removal for his deliberate failure to enforce municipal ordinances, further stating that such omission is at most an abuse of discretion or a difference in opinion as to the merits of the ordinances, and never constitutes the just cause required for removal from office in impeachment proceedings.

3. Whether or not the judgment of the Supreme Court of Puerto Rico is palpably null and void, for lack of jurisdiction, and, consequently, constitutes a plain denial to petitioner herein of due process of law, in view of the fact that the local District Court of San Juan acted without jurisdiction or authority and, therefore, on appeal from its judgment, the Insular Supreme Court could not acquire jurisdiction to consider and decide the case.

Reasons Relied On for the Allowance of the Writ.

This case involves important questions of local constitutional law affecting each and every one of the seventy-seven municipal governments now organized in the Island of Puerto Rico. By virtue of the precedent established by the Insular Supreme Court and sanctioned by the Circuit Court of Appeals for the First Circuit, the all important separation of powers between two of the three coordinate branches of municipal government has been repudiated, insofar at least as all municipal executives are left free to enforce or ignore municipal legislative enactments, according to whether they deem such enactments wise or not.

To hold, as the Insular Supreme Court did, later sanctioned by the affirmance of the Circuit Court of Appeals,

that such dictatorial powers can validly reside in the office of City Manager or Mayor of a municipality, and that the deliberate omission to enforce municipal legislation duly approved and promulgated amounts at most to an abuse of *discretion* and not to the just cause required by the statute for removal from office, wholly subverts our democratic form of government, and is in conflict with the letter and spirit of the Organic Law of Puerto Rico (39 Stat. 951, 48 U. S. C. A. 737), which created for the Island a government patterned after those of the separate states, divided into three departments, the executive, the legislative and the judicial.

Petitioner herein respectfully submits, and earnestly believes, that the Circuit Court of Appeals has so far sanctioned a departure by the Supreme Court of Puerto Rico from the accepted and usual course of judicial proceedings, as to call for the exercise of the power of supervision of which this High Tribunal is invested, in order that a fundamental principle of the democratic form of government prevailing in all the municipalities of Puerto Rico be effectively safeguarded and upheld.

It is obviously unnecessary to cite precedents in support of the point as to lack of due process of law in the premises, based on the want of jurisdiction in the Insular Supreme Court to enter its judgment in the instant case. A judgment rendered without jurisdiction over the subject matter is a mere nullity, and its enforcement violates substantial constitutional rights of the party affected. In the case at bar, the party affected is the legally constituted governing body of the Capital of Puerto Rico, representing the interests of over two hundred thousand citizens who, manifestly, are entitled to have their rights protected against unlawful encroachments, and who desire to be governed in accordance with democratic ideals and principles, as the Congress of the United States intended they should be governed.

Wherefore your petitioner respectfully prays that a writ of certiorari be granted herein and the judgment of the Circuit Court of Appeals for the First Circuit, in the case entitled *Board of Commissioners of San Juan* versus *Carlos M. de Castro,* No. 3643, affirming the judgment of the Insular Supreme Court which reversed that of the District Court of San Juan, be reversed.

F. Fernandez Cuyar,
Attorney for Petitioner.

H. Gonzalez Blanes,
Of Counsel.

I hereby certify that the foregoing petition, in my opinion, is well founded and entitled to be considered by this Court, and, further, that it is filed in good faith and not for the purpose of delay.

San Juan, Puerto Rico, May 13, 1941.

F. Fernandez Cuyar.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion of the District Court of San Juan (rendered on August 21, 1939) is not reported. (R. 38-45). The opinion of the Supreme Court of Puerto Rico (rendered on June 28, 1940) is reported in 53 P. R. Dec. 153, 163 (Spanish Edition). It is not rendered yet in the English edition of the Puerto Rico Reports. (R. 178-187). The opinion of the Circuit Court of Appeals for the First Circuit is reported in 116 Fed. (2d.) 806, and will be found, also, in the record at pages 241 and 242.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code of the United States, as amended by the Act of Congress of February 13, 1925, C. 229, 43 Stat. 938. (28 U. S. C. A. 347).

The judgment of the Circuit Court of Appeals for the First Circuit was entered on January 10, 1941 (R. 241), and rehearing thereof was denied on February 20, 1941. (R. 264).

Statement.

A statement of the case is made in the petition. (Pages 2-6).

The grounds for the petition, concisely stated, consist of the following:

The judgment of the Insular Supreme Court, affirmed by the Circuit Court of Appeals, is patently erroneous insofar as it fails to recognize "our constitutional division of powers between the legislative and executive branches of the government of the Capital of Puerto Rico". (*Bonet* v. *Yabucoa*

Sugar Co., 306 U. S. 506, 511, 83 L. Ed. 946, 950). It, therefore, is in conflict with the letter and spirit of the Organic Law of Puerto Rico (39 Stat. 951, 48 U. S. C. A. 737 *et seq.*) which, as this Court has repeatedly stated, created for this Island "the typical American governmental structure, consisting of the three independent departments —legislative, executive and judicial—". *Puerto Rico* v. *Shell Co.*, 302 U. S. 253, at page 262; *Porto Rico* v. *Rosaly and Castillo*, 227 U. S. 270, 57 L. Ed. 507. Cf. *Gromer* v. *Standard Dredging Co.*, 224 U. S. 362, 56 L. Ed. 801.

The judgment of the Insular Supreme Court, affirmed by the Circuit Court of Appeals on the basis of want of patent error, deprives petitioner herein, and, consequently, all the inhabitants of the Capital of Puerto Rico, of due process of law in the premises, since such judgment is null and void, having been entered by the Insular Supreme Court in a cause over which it had absolutely no jurisdiction.

There was want of jurisdiction because: (a) the special statute involved (Act No. 99 of May 15, 1931, Laws of Puerto Rico, 1931, pages 638-641) does not authorize any appeal at all from the judgments of the District Court of San Juan in proceedings for review of legislative or administrative acts of the Board of Commissioners; and (b) because the District Court of San Juan, where the original petition for review was filed by respondent herein, also lacked jurisdiction of the subject matter, since Section 46 (See Appendix) of the above referred statute created, as a special and new remedy, a writ of review whose specific, clear and exclusive purpose is the judicial revision of "any legislative or administrative act" of the Board of Commissioners, while the act of removing or ousting the City Manager, on charges, is of a judicial or quasi-judicial nature, and, therefore, is not included among the acts properly reviewable under the statute. It follows, in consequence, that the Insular Supreme Court, on appeal from the Dis-

trict Court's judgment, could not acquire jurisdiction of a subject matter over which said District Court itself was wanting in jurisdiction.

Specification of Errors Urged.

1. The Circuit Court of Appeals erred in failing to hold that the Supreme Court of Puerto Rico was patently erroneous in its conclusion that the failure of the City Manager to put in effect and enforce several duly approved legislative enactments of the Board of Commissioners, did not constitute just cause for the removal of said City Manager. The error of the Insular Supreme Court in this respect implies, in effect, a clear violation of the letter and spirit of the Organic Law of Puerto Rico, inasmuch as our constitutional division of powers between the legislative and executive branches of government is obviously ignored, while drastic authority and far reaching powers are lodged in the office of the municipal executive, authorizing him to enforce or disregard legislative enactments at his option or caprice.

2. The Circuit Court of Appeals erred in concluding that the Insular Supreme Court was not inescapably wrong in holding that it had jurisdiction of the subject matter involved in this case, notwithstanding the absence of statutory authorization for the appeal taken by respondent herein from the judgment entered by the District Court of San Juan, and in spite of the fact that the special statute governing the special proceeding filed by respondent originally in the said District Court of San Juan does not authorize appeals to the Supreme Court of Puerto Rico. The judgment entered in this case by said Insular Supreme Court is, therefore, null and void, and its execution or enforcement would deprive petitioner herein and the Capital of Puerto Rico of due process of law.

3. The Circuit Court of Appeals erred in upholding the Insular Supreme Court's views as to the jurisdiction of the District Court of San Juan over this controversy. Manifestly, said District Court was not empowered to consider, entertain or decide the petition for review filed by respondent herein in said court, since the pertinent statute confers a special jurisdiction on the District Court of San Juan to review only "legislative or administrative acts" of the Board of Commissioners of San Juan, and the removal of the City Manager by impeachment proceedings, after a hearing upon charges, is neither a legislative nor an administrative act, but peculiarly a judicial or quasi-judicial act.

ARGUMENT.

Summary of Point I.

"The judgment of the Insular Supreme Court is patently erroneous insofar as it fails to recognize our constitutional division of powers between the legislative and executive branches of government."

Point I.

Upon the passing by the Congress of the United States of the "Act to Provide a Civil Government for Porto Rico, and for other purposes", (39 Stat. 951, 48 U. S. C. A. 737, *et seq.*), a government was created in Puerto Rico similar to "the typical American governmental structure, consisting of the three independent departments—legislative, executive and judicial—".

Puerto Rico v. *Shell Co.*, 302 U. S. 253 at page 262;

Puerto Rico v. *Rosaly and Castillo*, 227 U. S. 270, 57 L. Ed. 507;

Cf. Gromer v. *Standard Dredging Co.*, 224 U. S. 362, 56 L. Ed. 801.

In the case of *Bonet* v. *Yabucoa Sugar Co.*, 306 U. S. 506, 511, 83 L. Ed. 946, 950, this Supreme Court expressed its opinion to the effect that judgments of the Puerto Rican courts upon matters of purely local concern, which embody a recognition of our constitutional division of powers between the three branches of government, should not be disturbed by the Circuit Court of Appeals.

The limitation, thus attached to the generally recognized rule as to deference to judgments involving matters of purely local concern, comes into play directly in the case at bar. Assuming that the judgment rendered herein by the Supreme Court of Puerto Rico involved exclusively matters of local concern, and overlooking for the moment the absence of due process in the premises, based on lack of jurisdiction of the Supreme Court, still its judgment is patently erroneous and need not, under the deference rule, be sustained by this Court since it fails to recognize the constitutional division of powers between the legislative and the executive branches of the municipal government of the City of San Juan.

The holding of the Insular Supreme Court with respect to charge number twenty-two (R. 185) clearly ignores such constitutional division of powers. The City Manager failed deliberately to put into effect various ordinances duly approved by the Board of Commissioners. This was the substance of the charge. It was amply proved, but the Supreme Court ruled that such omission of the City Manager constituted nothing more "than perhaps an abuse of discretion or a difference in opinion as to the merits of the ordinances, and were not the just cause to which the statute relates" (R. 185).

The decision on this point is clearly erroneous in so far as it justifies a municipal executive in failing to comply with his duty of enforcing municipal laws because in the opinion of such executive said municipal laws or ordinances are of no merit.

In accordance with the law, the City Manager is the executive branch of the new government created by the statute, and the Board of Commissioners is the legislative branch (Sections 9, 11 and 21 of Act No. 99 of May 15, 1931, Laws of P. R., 1931, pp. 632 and 638). It is the unquestionable duty of the municipal executive to enforce the laws approved by the legislative branch of the government, and the deliberate failure to enforce said ordinances undoubtedly amounts to a non-compliance of said duty, such non-compliance not being justfied by the fact that the municipal executive has an opinion different from that of the municipal assemblymen with regard to the merits of the approved legislative measures.

To hold, as the Insular Supreme Court has done, that such a thing may be done impunibly and that it only amounts to an abuse of discretion and not to the just cause required by the statute for removal, establishes a precedent of dangerous effects on the administration of the affairs of the several municipalities of this Island and of the government of the Capital, and is in conflict with the spirit and letter of our Organic Act in creating for this Island a government system divided into three departments: executive, legislative and judicial, and prohibiting the intervention of one of these departments in the affairs of the others. This fundamental principle of a democratic system of government has always been respected by all courts in this Nation. The refusal of the Mayor or City Manager to enforce these municipal ordinances is entirely unjustified. In a well constituted system of government, the refusal by the Mayor to enforce laws on the ground that he does not personally agree with the legislative branch as to the merits of the legislation approved, is unthinkable. In the final analysis, this practice, if upheld, converts the executive power into the sole arbiter of the validity of the municipal legislation.

We respectfully submit that in our democratic system of government the doctrine laid down by the Insular Supreme Court as to charge 22, brought against the City Manager, cannot prevail.

Summary of Point II.

"The Supreme Court of Puerto Rico was clearly and inescapably wrong in assuming jurisdiction over the subject matter of this suit, firstly, because, the right of appeal being purely statutory and no part of due process of law, neither the pertinent statute nor any other authorized the appeal taken in the instant case from the judgment of the District Court of San Juan to the Insular Supreme Court; and, secondly, because on appeal said Insular Supreme Court could not acquire jurisdiction of a suit over which the inferior tribunal did not itself have jurisdiction, since the act of the Board of Commissioners to be reviewed was not of a legislative or administrative character."

Point II (a).

Section 46 of Act No. 99, Laws of Puerto Rico, 1931, page 652 (See Appendix), under which respondent herein resorted to judicial action against the resolution removing him from the office of City Manager for cause, provides for a review in the District Court of San Juan of any legislative or administrative act of the Board of Commissioners which might violate constitutional rights of the complainant, or might be contrary to the Organic Act or to the laws of Puerto Rico.

This section created an extraordinary proceeding. It provided a new remedy for a new situation, such remedy being exclusive and not included among those enumerated in the Code of Civil Procedure. The special certiorari proceeding thus created must be brought solely and exclusively before the District Court of San Juan, to which

court said section grants jurisdiction. The statute in terms does not authorize any of the parties to appeal from the judgment rendered by the District Court of San Juan, and, in the absence of specific statutory authority, such right of appeal does not lie. No appeal to the Insular Supreme Court having been authorized, said court never had jurisdiction, authority or power to entertain and decide the appeal taken by the appellant, and, hence, the judgment entered is absolutely null and void.

It is elementary to state the general principle that the right of appeal is a purely statutory one. *Cabassa* v. *Bravo,* 21 P. R. R. 173; *Carrero, et al.* v. *Diez & Perez,* 27 P. R. R. 433.

The right of appeal is no part of due process of law (*District of Columbia* v. *Clawans,* 300 U. S. 617, 81 L. Ed. 843), and legislatures may, in the absence of an express constitutional provision, restrict, limit, condition or abolish the same, or may grant such right only once. (*Standard Oil Co.* v. *Missouri,* 224 U. S. 270, 56 L. Ed. 760).

In the case at bar, the Legislature of Puerto Rico created a new government for the Capital, and in the act so providing it attempted to cover all the situations that could arise in the new and different form of government established. Said act finally granted exclusive jurisdiction to only one of the various district courts to review or annul legislative or administrative acts of the Board of Commissioners or of officers of the new government that might infringe upon the rights of the parties affected; and to that end the law created an extraordinary statutory proceeding of review. If such special proceeding had not been created in the Act, the same would not have existed. In establishing the new remedy for new situations that might arise in the relations of the new government created, the Legislature saw fit to invest solely and exclusively the District Court of San Juan with jurisdiction to review the acts of the Board or of the

officers of the Capital. *Cf. Reetz* vs. *Michigan,* 188 U. S. 505, 47 L. Ed. 563.

See *Peters* vs. *Chicago & N. W. R. Co.,* 162 N. W. 916; *Board of Canvassers, Baxter, et al.* vs. *Sleeman,* 221 N. W. 382, and *In re Jeness,* 261 N. W. 415.

In close analogy with what was said by the Supreme Court of Wisconsin in the above cited decisions, it is perfectly clear that in the present case the certiorari created by Section 46 of the Act is neither a special proceeding "according to the course of the common law", nor a classic certiorari proceeding like that provided for in the general law of certiorari, and, hence, the general provisions of the Code of Civil Procedure are not applicable.

As the law creating the government of the Capital is a special statute which contains provisions creating and organizing separate and independent branches of the new government, it authorizes, insofar as the judicial branch is concerned, solely and exclusively the District Court of San Juan to review the acts of the officers and of the Board of Commissioners of the Capital; it defines an extraordinary proceeding for such purpose; and, in a significant manner, keeps silent as to the right to appeal to other courts, in spite of the fact that the legislator, in other cases, when creating other special statutory remedies, has provided that the judgment that may be rendered by the competent courts might be appealed to the Supreme Court of Puerto Rico. See, for example, the Act of March 9, 1911 (Session Laws, page 124), establishing a procedure for the recovery of taxes paid under protest. This act is now repealed, but, for the purposes of our argument, it will suffice to show that when the Legislature, in creating a new statutory proceeding, desired that there be more than one review, it said so in an express manner. Section 3 of said act provided that anyone paying a tax under protest might sue the Treasurer of Puerto Rico before a court of competent jurisdiction,

in order to obtain the refund of said sum and established the procedure to be followed when the case was decided by said court. At the end of the section the Legislature inserted the following:

> "Either party to said suit shall have the right of appeal to the Supreme Court."

On April 19, 1927, the Legislature approved a new Act establishing a statutory proceeding to authorize payment of taxes under protest and the refund of same. Section 4 of this Act specifically provides:

> "Any party may take an appeal in accordance with the provisions of the law for appeals in civil cases." (Session Laws of 1927, page 124.)

Another good illustration is the Act relative to declaratory judgments, approved by the Legislature of Puerto Rico the 25th. of April, 1931, Section 7, of which expressly provides that "all orders, judgments and decrees authorized hereunder may be reviewed just as any other orders, judgments and decrees" (Session Laws of 1931, p. 380).

All this undoubtedly reveals the intention of the Legislature as to the right of review granted by Section 46 of the Act establishing a government for the capital. The fact that it did not grant especially the right of appeal to the Insular Supreme Court from the judgments or orders entered by the District Court of San Juan in the statutory proceeding for review therein created, evidently reveals that it was the intention and wish of the Legislature that the legislative or administrative acts of the Board of Commissioners or of the officers of the Capital of Puerto Rico be reviewed only once. *Cf. Petition of Forbes,* 146 N. E. 448.

Both the right asserted by respondent herein and the provisions under which he pretends to enforce his alleged right, were unknown to the common or to the civil laws. The right and whatever remedy existed were created solely

by statute. The jurisdiction of the District Court of San Juan in the instant case was exercised in conformity with the statute and not according to the course of the common or of the civil law. The proceeding is a special statutory one, and cannot adequately or logically be comprised generally within the scope of sections 292 and 295 of the Code of Civil Procedure of Puerto Rico, providing for appeals to the Insular Supreme Court from the judgments of all district courts. Cf. *Phelps* vs. *Board of Appeals,* 325 Ill. 625, 856 N. E. 826.

Sundry decisions of other states uphold the general rule laid down in the *Phelps* case, *supra:*

Luten, et al. vs. *Smith,* 163 N. E. 536 (Indiana);

Pilgrim Consol. Mining Co. vs. *Board of Commissioners,* 78 Pac. 617;

Board of Commissioners vs. *Pinnacle Gold Mining Co.,* 85 Pac. 1005.

It has been held in California that the right of appeal, granted by a special statute, to an intermediate court, does not comprise the privilege of appealing from the judgment rendered by said intermediate court to a higher court, unless the special statute so provides.

> "The remedy of an appeal to some specified subordinate court may be provided for by the statute, but such a remedy is a matter of grace and not of right, and does not confer the privilege of having the judgment of the reviewing court gain upon appeal taken to a court of last resort. (Authorities.)" *In re Sutter-Butte,* 218 Pac. 27.

The same rule has been accepted in the State of Massachusetts:

> "Where jurisdiction is given to a court or magistrate by a statute, and there is no provision for an appeal, the decision of the court or magistrate is final, apart

from a possible remedy by certiorari or mandamus. (Authorities.)" *Carilli* v. *Hersey,* 20 N. E. (2d., 492 (decided April 18, 1939).

The Supreme Court of the State of Kansas has very recently ratified the doctrine. It has said that it will not assume jurisdiction of an appeal taken from a special statutory proceeding if the statute defining said proceeding does not specifically grant such right of appeal.

"It was the province of the Legislature to determine the orders or judgments from which an appeal to this court would lie. It is interesting to note that with regard to the subject of an income tax the Legislature has seen fit to provide for appeals not only from the order of the Tax Commission to the district court but also from that court to this court. G. S. 1935, 79-3227. That statute further expressly provides the appeal may be taken as in civil cases except the time of appeal is limited to sixty days. As to an inheritance tax order no provision is made for appeals to this court as in civil cases or otherwise. Without such provision we cannot arbitrarily assume jurisdiction.

* * * * * * *

"No provision having been made for appeals to this court in inheritance tax matters, we are without authority to rule on other contentions which inhere in the controversy." *Bank* v. *State, et al.,* 68 Pac. (2d) 1076 (June 12, 1937).

The syllabus of the above case reads thus:

"Supreme Court cannot arbitrarily assume jurisdiction of appeal in a special statutory proceeding where no provision is made by statute for such an appeal.

"Where inheritance tax statuate provided that taxpayer might petition Inheritance Tax Commission for abatement of tax and apply to district court for review

of commission's order but did not provide for further appeal, the Supreme Court was without authority to entertain appeal from district court's decision."

The same rule prevails in the State of Nevada:

"The right of appeal to this court is one based entirely on statute, and this court is prohibited from taking jurisdiction unless the party appealing has, in the first instance, the statutory right of appeal.

* * * * * * *

"It is a question of jurisdiction, and this jurisdiction is one with which this court cannot invest itself, however anxious the court might be so to do or however urgent the matter might be. No order of the lower court, no sanction or permit, can authorize this court to take cognizance of a matter on appeal, unless the right of appeal clearly appears as a matter of law." *State* v. *State Bank, etc.,* 137 Pac. 400.

Referring to the statutory proceeding granted by a workmen's compensation act to review awards of compensation, the Supreme Court of Nevada in another case, expressed itself thus:

"Under the Workmen's Compensation Act the only appeal permissible from an award of compensation is the limited one authorized by the act to be taken to the district court, and the Supreme Court has no authority to entertain an appeal from the decision of that court."

Said the Court:

"We conclude that this court is without jurisdiction to review the decision of the district court * * *

"We are not warranted in borrowing rules and methods from the Civil Code not included in the act itself—methods prescribed for ordinary civil actions which the legislature for obvious reasons were seeking

to avoid, and for which it provided a substitute. * * * More than that, the legislature had under consideration the subject of review of the findings and awards of the commission, and it provided for a limited review in the district court. Having dealt with the subject of appeals, it is inferable that no different or other appeal was intended to be given by the legislature. The one specifically authorized in the new system is exclusive, and the decision of the authorized appeal is necessarily the end of the proceeding. The legislature had the power to allow an appeal to a tribunal and to limit it to a particular one. The only appeal provided for is the one to the district court, and this court cannot well broaden the act by adding another." Norman *v.* Consolidated Cement Co., 274 Pac. 233.

We wish finally to call once more the attention of this Honorable Court—although this may amount to something well known and elementary—that an appeal not authorized by statute confers no jurisdiction on the appellate court to decide the questions raised, even if the appellee does not invoke such lack of jurisdiction.

"An appeal, unauthorized by the statute, gives no jurisdiction for decision of a question raised thereby, even though respondent filed no brief." Wilt *v.* Cold Storage Co., 110 N. W. 177.

"An attempted appeal where the statute authorizes none confers no jurisdiction upon this (the appellate) court, and any judgment it might undertake to render upon the merits of the controversy would be void." Booth *v.* Domestic Water Co., 49 Pac. 368.

Point II (b).

The already considered Section 46 of the Act establishing a special government for the Capital creates, as a special and new remedy, a writ of review whose specific finality or purpose, as provided in the statute, is the review of "any legislative or administrative act" of the Board of Commis-

sioners, or of any official of the Capital. This is a proceeding which, in the absence of a statute creating it, would not exist, and, hence, the same should not be enlarged by judicial interpretation to cover other cases not expressly enumerated in the law.

> "The provisions of a statute prescribing a statutory remedy must be strictly pursued; and particularly where the statute creates a new cause of action, and provides a remedy therefor, not only is the remedy exclusive, as announced in subsection 6b, but the provision is regarded as mandatory and must be complied with in all respects."
>
> "The statutory remedy can be invoked only to the extent and in the manner prescribed; and where it is prescribed for a particular purpose it cannot be used for other purposes." 1 C. J. S. 973, Sec. 5.
>
> "But statutes which take away, change or diminish fundamental rights, statutory remedies for rights unknown to the common law, and statutes which provide new and extraordinary remedies, must be construed strictly both as to the cases embraced within their terms and as to the methods to be pursued." 59 C. J. 1130, Sec. 669.

Manifestly, the new jurisdiction granted to the District Court of San Juan by Section 46 of the aforesaid act is limited solely and exclusively to review or annul, through a special certiorari proceeding, any legislative or administrative act of the boards or of any official of the Capital.

It is almost a universal rule accepted by the courts that when a statute grants to a person or to a board power to remove for just cause, the authority thus granted is of a judicial or quasi judicial nature, and the act of removing cannot be considered as a legislative or administrative act.

> "Generally, where a statute gives a body or a person power to remove for 'cause' or 'just cause', such power is held to be a judicial power and the person or

body in whom the power is vested may not remove without notice and a hearing. McCulley *v.* State, 46 L. R. A. 571, and authorities cited. State et al. *v.* Hitchcock, 16 L. R. A. 413, and authorities. Hagerty *v.* Shedd, 75 N. H. 396." *Belaval* v. *Todd,* 22 P. R. R. 593.

The Insular Supreme Court has very recently held specifically that these acts are not of an administrative but of a judicial or quasi judicial nature.

"We cannot agree with the petitioners that any decision of the same kind as that rendered on November 30, 1938, would be an administrative decision. A decision of a commission, no matter of what kind, rendered under the authority awarded it by the Legislative Assembly to decide in regard to the property or rights of citizens, after hearing the interested parties, is a quasi judicial decision and not an administrative decision as the petitioners allege. See Baker *v.* Godding County (1914) 25 Idaho 506, 138 P. 342; Robinson *v.* Sup. of Sacramento (1860) 16 Cal. 208.

"In the case of City of Macon *v.* Anderson (1923) 155 Ga. 607, 117 S. E. 753 (a writ of error, dismissed in 1925, 269 U. S. 592, 70 L. ed. 429), it was decided that a writ of prohibition would lie to keep a municipal assembly from hearing certain charges for the dismissal of a member of the board of commissioners of the aqueduct, since the function of the board in said proceedings was judicial.

"See also Beavers *v.* Armistead (1923) 156 Ga. 833, 120 S. E. 526; Speed *v.* Detroit, 98 Mich. 360, 57 N. W. 406; Glover *v.* City Council of Columbus (1923) 132 Miss. 776, 96 So. 521, and O'Donnell *v.* Morrissey (1934) 151 Misc. 315, 272 N. Y. Supp. 451."

Sifre v. *Pellon, etc.,* 54 P. R. R. 568.

It is almost unnecessary to remind this Court that the act which creates the new government for the Capital provides that the City Manager may be removed by the

Board of Commissioners, for just cause, upon hearing and an opportunity to defend himself either in person or through attorneys (Section 22; See Appendix). Hence, in the case at bar the applicable law grants to the Board of Commissioners judicial authority in this regard. This being clearly so, bearing in mind that Section 46 of said act, in defining the new jurisdiction of the District Court of San Juan, limits said jurisdiction solely and exclusively "to annul or to review by writ of certiorari any legislative or administrative act", it will hardly be doubted that said District Court had no power, authority or jurisdiction in this special certiorari proceeding to review or annul a judicial act of the Board of Commissioners. The power granted to said court cannot be extended by judicial interpretation to review or to annul acts other than those of a legislative or administrative nature, for, if the statute were so construed, courts would be amending the law by adding to its plain letter something not contained therein and which the Legislature undoubtedly did not intend to include.

The above may be some of the reasons justifying the doctrine repeatedly stated by the Supreme Court of Puerto Rico to the effect that the special certiorari proceeding granted by Section 65 of the general municipal law (Act No. 11 of 1924), Special Session Laws, p. 76) is not the adequate remedy to review the removal of an officer, although such removal may have been decreed without just cause. The fact may be especially mentioned that the Insular Supreme Court has held that the decisions with regard to the Act of 1924 are applicable, in so far as they construe the aforesaid Section 65, to Section 46 of the Act establishing a special government for the Capital of Puerto Rico. See *Valldejuli* v. *de Castro,* 52 P. R. R. 286. For years said court has upheld the doctrine that the special certiorari proceeding, of which we are speaking, is not the adequate remedy to review the removal of an officer, although such removal

may have been decreed without just cause; and also that the officer or organism authorized to remove is not subject to some of the niceties that govern a trial court. *Coll* v. *Todd,* 35 P. R. R. 573. The rule was ratified in *Rivera Aromi* v. *Municipal Assembly,* 39 P. R. R. 71.

The rule was again ratified with marked emphasis in the case of *Fernandez Vanga* v. *Pavia,* 42 P. R. R. 740, wherein the court cited the cases of *Coll* and *Rivera Aromi, supra,* and reiterated once more that the removal of an officer, even without just cause, could not be reviewed by the special certiorari proceeding now under discussion.

Finally, in *Valldejuli* v. *de Castro, City Manager,* 52 P. R. R. 286, the Insular Supreme Court, through Mr. Justice Wolf—the same Judge who delivered the opinion of the court in the case at bar—held that as Section 65 of the general municipal law and Section 46 of the Act creating the government of the Capital were notably similar, the decisions with regard to the Act of 1924 are applicable to the Act of 1931, and that in view thereof, in conformity with the cases of *Coll, Rivera Aromi* and *Fernandez Vanga, supra,* the aforesaid special certiorari is not the proper procedure to look into and weigh the evidence introduced at a public hearing held for the removal of an officer, stating also that "in the absence of some statutory limitation, the power of removal is an incident of the power to appoint".

In short, the reason adduced by petitioner in support of its contention that the District Court of San Juan never had jurisdiction to entertain and decide the special certiorari proceeding brought by Doctor Carlos M. de Castro, is that, as the resolution removing the City Manager is a judicial or quasi judicial act of the Board of Commissioners, and as the District Court of San Juan, by virtue of Section 46 of the above-mentioned act, has jurisdiction solely and exclusively to annul or to review by writ of certiorari legis-

lative or administrative acts of the Board of Commissioners, and as courts may not extend, through judicial interpretation, the scope of the jurisdiction granted by a special act, said District Court of San Juan lacked authority, power or jurisdiction to review the aforesaid judicial or quasi judicial act which removed the City Manager.

It is, therefore, plain that as the lower court had no jurisdiction to entertain and decide said certiorari proceeding, the Insular Supreme Court also lacked jurisdiction to consider and decide the appeal taken from the judgment of the District Court.

Conclusion.

For the reasons stated, it is respectfully submitted that the judgments of the Supreme Court of Puerto Rico and of the Circuit Court of Appeals for the First Circuit in the case at bar are palpably erroneous, and their enforcement would be tantamount to a deprivation of the property of petitioner and of the Capital of Puerto Rico without due process of law, as well as a repudiation of the democratic principles of government in the various municipalities of Puerto Rico, and the petitioner, therefore, prays his writ of certiorari in the present case be ordered to issue, and the judgment of the Circuit Court of Appeals for the First Circuit be reversed.

F. Fernandez Cuyar,
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H. Gonzalez Blanes,
Of Counsel.

May 13, 1941.

APPENDIX I.

Section 46 of Act No. 99 of May 15, 1931; Puerto Rico Laws of 1931, page 652:

"Section 46.—On motion of the aggrieved party, the District Court of San Juan shall have jurisdiction:

"(a) To annual or to review by writ of certiorari any legislative or administrative act of the Board of Commissioners, of the Administrative Board, or of any official of the Capital, which infringes the constitutional rights of the complainant, or which is contrary to the Organic Act or to the laws of Puerto Rico."

APPENDIX II.

Section 22 of Act No. 99 of May 15, 1931; Puerto Rico Laws of 1931, page 638:

"Section 22.—The City Manager may be removed by the Board of Commissioners, for just cause, upon hearing and an opportunity to defend himself either in person or through attorneys. The following shall be causes for the removal of the City Manager: Any act of his constituting a felony; any act of his constituting a misdemeanor and implying moral turpitude; or carelessness, inexcusable negligence in the performance of his duties, or immoral or incorrect conduct in the exercise thereof."

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

Respondent's brief in opposition

No. 94

BOARD OF COMMISSIONERS OF SAN JUAN,
Petitioner,

vs.

CARLOS M. DE CASTRO
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 94

BOARD OF COMMISSIONERS OF SAN JUAN,

Petitioner,

vs.

CARLOS M. DE CASTRO

Respondent.

MOTION FOR LEAVE TO FILE OUT OF TIME.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States.

Respondent Carlos M. de Castro respectfully prays for leave to file the enclosed brief out of time, in opposition to the petition for writ of certiorari.

HUGH R. FRANCIS,
Counsel for Respondent.

GABRIEL DE LA HABA,
Of Counsel.

September 24th., 1941.

BRIEF IN OPPOSITION TO THE GRANTING OF THE PETITION OF CERTIORARI

Point one of Petitioner's brief stresses the argument that the Supreme Court of Puerto Rico failed to recognize the constitutional division of powers. We fail to see any weight to this argument. The Supreme Court of Puerto Rico acted within its province, in a judicial capacity, in reviewing the evidence on the charges before the Board of Commissioners and determining that it did not substantiate the charges and was not the just cause contemplated by the statute as grounds for removal. This was in harmony with a long line of decisions by our Supreme Court in the following cases:

Pioraneti vs. *Asamblea*, 31 P.R.R. 522, Sp. ed.; *San Millán* vs. *Asamblea*, 32 P.R.R. 496; *Suarez* vs. *Municipio*, 33 P.R.R. 271; *Cantrés* vs. *Municipio*, 34 P.R.R. 765; *Coll* vs. *Todd*, 35 P.R.R. 572; *Peña* vs. *Asamblea*, 36 P.R.R. 801; *Asamblea* vs. *Corte de Distrito*, 36 P.R.R. 650; *Alfaro* vs. *Asamblea*, 35 P.R.R. 728; *Calero* vs. *Asamblea*, 37 P.R.R. 667; *Porras* vs. *Consejo Municipal*, 37 P.R.R. 689; *Banuchi* vs. *Asamblea* 37 P.R.R. 878; *Rivera* vs. *Asamblea*, 39 P.R.R. 71; *Todd* vs. *Asamblea*, 39 P.R.R. 130; *Chapel* vs. *Asamblea*, 49 P.R.R. 607 Sp. ed.; *Suau* vs. *Capital*, 50 P.R.R. 768 Sp. Ed.; *Valdejuli* vs. *De Castro*, 52 P.R.R. 286.

To accept petitioner's argument would be tantamout to holding that in our democratic form of government each branch thereof, though independent, is not subject to some restraint as contemplated by the framers of the Constitution. Under this theory it would be difficult to imagine any case where the judiciary could intervene to correct wrongs inflicted upon a citizen by the executive or legislative branches of the government.

Points two and two (b) of petitioner's brief can be reduced to the simple proposition that there was no jurisdiction by the courts in Puerto Rico to review by certiorari the acts of the Board of Commissioners of San Juan involving the dismissal of the City Manager.

Petitioner argues that there is no statutory authority for an appeal from a decision in a special certiorari proceeding under the Municipal Law of Puerto Rico or under the special law for the Capital of Puerto Rico (Art. No. 99 Laws of Puerto Rico, 1931 page 652).

This same argument has come up time and again and the Supreme Court has decided that an appeal is proper. We refer to the cases above cited and to Section 295 of the Code of Civil Procedure of Puerto Rico, 1933 Ed. Page 139.

The petitioner argues that inasmuch as the statute creating the remedy of judicial revision by certiorari (Section 46 of Act. No. 99 of May 15, 1931, Laws of Puerto Rico 1931, page 652)) of all legislative or administrative acts of the Board of Commissioners which infringe rights of the complaint specified therein, limits said review to "legislative or administrative acts" that the case at bar does not fall within this classification as it was neither legislative nor administrative.

In support of this argument petitioner cities the case of Sifre vs. Pellón, 54 P.R.R. 568, which is a case under a special law creating the Insular Racing Commission.

The case in point regarding removal of municipal officers in which the Supreme Court of Puerto Rico held that the removal was an administrative act though the procedue therefore was of a quasi judicial nature, is the case of Todd vs. Municipal Assembly 39 P.R.R. 130, a criterion not challenged, until now, in a long line of subsequent municipal cases decided by the Supreme Court of Puerto Rico, cited above.

The weight of authority, apparently adopted by the Supreme Court of Puerto Rico in the case of Todd vs. Municipal Assembly, (supra) and followed uninterruptedly to the present, seems to be, that proceedings

in the excercise of a power to remove officers by the executive or legislative branch of the government are regarded as administrative rather than judicial, although the power is exercised in a judicial way, 46 C. J. 993.

Section 13 of Act No. 99, Laws of Puerto Rico 1931, page 634, provides that the resolutions and acts of the Board of Commissioners shall be stated in ordinances or resolutions. It must be borne in mind that the removal of the City Manager was effected by Resolution No. 373 of April 5th 1930 (R. 6). This act was clearly not a judicial or quasi judicial one but an administrative order following a procedure which participated of a quasi judicial nature. In other words, the fact that the proceeding may have been of a quasi judicial nature does not make the final action of the Board in dismissing the City Manager a judicial or quasi judicial one, but on the contrary, we believe it to be, as held by our Supreme Court, an administrative act.

CONCLUSION

No showing having been made by the petitioner before the Circuit Court of Appeals that the action of the Supreme Court of Puerto Rico was inescapably wrong, in its construction of the local statutes, or patently erroneous, in its conclusion of the evidence, respondent prays that the writ of certiorari be dismissed and the judgement of the United States Circuit Court of Appeals for the First Circuit be affirmed.

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GABRIEL DE LA HABA,
Of Counsel.

September 24th., 1941.